

**Dissent of Commissioner Susan P. Kennedy
Southern California Water Company
March 16, 2004**

I dissent. Today's Decision misstates precedent, ignores record evidence and creates needless havoc for both SCWC and its customers. The Decision arbitrarily assigns gain on sale according to a subjective formula having no support in the record and casually voids a lease of water rights on which the City of Folsom is utterly dependent for future growth.

The Decision rests on an analysis of past CPUC decisions that includes several examples of the Commission punishing regulated utilities for failing to file applications under Public Utilities Code §851 before disposing of utility-owned property. Fundamental to the analysis in today's Decision is a conclusion that SCWC's rights to take 5,000 acre-feet of water from the American River constituted "useful" property under §851 of the Public Utilities Code.

This conclusion is not based on evidence in the record. The Commission is simply substituting its business judgment for that of the water company. The record established that in 1994 when the water lease with the City of Folsom was executed, SCWC did not have facilities available to draw or treat the water leased to the City and had no economic reason to build facilities that would allow it to do so. The record also established that the type of water rights held by SCWC were subject to forfeiture if unused for more than five years, which in 1994 they had been, and that in all likelihood SCWC could not obtain the necessary environmental permits to extract the water. Finally, the record established that the City of Folsom had the right and the means to extract and treat the water. In other words, while the water rights had value to SCWC because they could be leased to the City, they were neither necessary nor useful property for utility purposes as envisioned by §851.

Far from forbidding the lease of the water rights, §851 explicitly authorized it.

In addition to ignoring the record and distorting the history of the transaction, this Decision also creates enormous uncertainty for the City of Folsom. Although Commissioner Lynch stated during the discussion that the City's rights would not

be adversely affected by adoption of her Proposed Decision, that is simply untrue. The Decision itself makes plain that the lease from SCWC to the City of Folsom is void:

“As SCWC did not seek or obtain an order authorizing the lease, we must void the lease from its inception as to SCWC.” (P.54)

The Decision tries to sugarcoat this result by ruling that we will not upset the City’s past dealings with SWC:

“Folsom’s use of and payments for the leased water rights in the past are unaffected by the voiding of the lease as to SCWC.” (P. 54, emphasis supplied.)

But of course that leaves open the question of what rights, if any, the City of Folsom now possesses. Section 851 protects only good faith purchasers for value. As of this moment, the lease is void and the City is on notice that SCWC has no legal right to lease water to it. With that notice, the City is no longer a good faith purchaser and is not protected by the good faith purchaser exception of §851. Under these circumstances, the City can justifiably conclude that as of today it no longer possesses the right to draw 5,000 acre feet of water from the American River and cannot predict when, if ever, it will have that right.

I turn now to the gain on sale issue. The opinion assigns an arbitrary 70-30 sharing of the gain from 1994 to the present to the ratepayers and shareholders, respectively. This formula has no basis in any prior Commission actions and, indeed, is the reverse of the normal ratio we use to allocate gains from a utility’s sale or lease of surplus property. But of much greater importance is the Decision’s requirement that SCWC retroactively assign 70 percent of all lease payments received to date to the ratepayers. This represents an undisclosed penalty in excess of \$6 million on SCWC. That is six times the amount of the so-called penalty that the Decision also imposes on SCWC. Together, these two penalties approximately equal one-third of SCWC’s 2003 net income. They are unjustified and are being imposed on SCWC for taking what I believe was an entirely lawful action.

Dated March 16, 2004, San Francisco, California

/s/ SUSAN P. KENNEDY

Susan P. Kennedy
Commissioner